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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1180

YICK CHIN,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The petitioner, Yick Chin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit dismissing his petition for review for want of jurisdiction.

OPINIONS BELOW

The decision of the Board of Immigration Appeals refusing to consider petitioner's application for suspension of deportation under the provisions of Section 244 of the Immigration and Nationality Act, as amended (66 Stat. 214, as amended October 24, 1962, 76 Stat. 1247, 8 USCA 1254), is set forth in the cer-

tified administrative record (R 1-2), and printed in Appendix C hereto, infra, pp. iv-v.

The decision of the Court of Appeals has not as yet been officially reported, but is set forth in the record and printed in Appendix A hereto, infra, pp. i-ii.

JURISDICTION

The Judgment of the Court of Appeals was filed and entered on November 28, 1967 (Appendix B, pp. iii). The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Does the United States Court of Appeals have jurisdiction to review an order of the Board of Immigration Appeals holding petitioner ineligible for suspension of deportation as an excluded alien?

2. Does Section 106(a) of the Immigration and Nationality Act vest in the United States Court of Appeals exclusive jurisdiction to review all final decisions of the Immigration and Naturalization Service?

STATUTES INVOLVED

Section 106(a) of the Immigration and Nationality Act of 1952, as amended (P.L. 87-301, October 26, 1961, 75 Stat. 651, 8 USCA 1105(a)), provides in part as follows:

"Judicial review of orders of deportation and exclusion—Exclusiveness of procedure

(a) The procedure prescribed by, and all of the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252 (b) of this title or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is later.

* * * * *

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. * * *

* * * * * *

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise."

Section 244 of the Immigration and Nationality Act of 1952, as amended (66 Stat. 214, as amended October 24, 1961, Public Law 87-885, 76 Stat. 1247, 8 USCA 1254), provides in part as follows:

"Suspension of deportation—Adjustment of status for permanent residence; contents

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); * * *."

STATEMENT OF THE CASE

The facts are not in dispute. Petitioner is a male alien, a native and citizen of China. Petitioner, following his arrival at the Port of San Francisco, California, April 6, 1952, at the age of 14 years, was ordered excluded and deported on the ground that he had failed to establish his claim to United States citizenship. He has remained in the United States on parole since 1952.

On or about February 5, 1965, petitioner submitted through counsel to the District Director, Los Angeles District, Immigration and Naturalization Service, an application with supporting documents seeking the benefits of Section 244(a) of the Immigration and Nationality Act, as amended. Said application was rejected by the District Director (Adm. Record, p. 8) and thereafter petitioner through counsel, filed with the Board of Immigration Appeals at Washington, D. C., a motion seeking acceptance and processing of his application for suspension of deportation, and said motion was denied by the Board of Immigration Appeals on July 15, 1966, stating that petitioner was ineligible for such relief since he had been excluded and is not a resident (App. C, infra).

The petition for review was filed in the Court of Appeals for the Ninth Circuit for the specific purpose of seeking judicial determination as to whether the administrative decision holding petitioner ineligible for suspension of deportation under Section 244 of the Immigration and Nationality Act, as amended, is erroneous as a matter of law.

REASONS FOR GRANTING CERTIORARI

This writ of certiorari is sought because the decision below is in conflict with decisions of this Court and contrary to decisions of other Circuits. In addition, the issues present herein raise important questions of due process of law as well as important questions per-

taining to the administration of the immigration and nationality laws of the United States.

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1. THE DECISION OF THE COURT OF APPEALS HOLDS THAT IT LACKS JURISDICTION TO REVIEW DENIAL OF AN APPLICATION FOR SUSPENSION OF DEPORTATION FILED BY AN EXCLUDED ALIEN.

In *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, the question before the Supreme Court was whether denial of discretionary relief, suspension of deportation, was a "final order of deportation" within the meaning of Section 106(a) of the Immigration and Nationality Act. In reaching its affirmative decision, this Court, at page 230, stated:

> "* * * Much of the litigation in deportation cases with respect to the setting aside of an administrative determination on the grounds of arbitrariness involves disputed eligibility questions and matters of statutory construction. Additionally, the concern of the Court below does not comport with the declared purpose of § 106(a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics. And the suggestion of the Court below that it is 'incredible' that Congress meant to burden the Courts of Appeal with review of all orders denying discretionary relief in deportation cases is unconvincing."

The Court then continued, by stating at page 232:

"To so construe § 106(a) does not constitute an expansion of 'the words used by Congress beyond their well-understood meaning.' Bifurcation of

> judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language. Therefore, this matter can and should be passed upon by the Court of Appeals, resulting in a judicial review procedure that would be both fair to the petitioner and expeditious for the Government."

Petitioner did not in his petition for review filed in the Court of Appeals challenge the validity of the order of exclusion and deportation or the proceedings culminating in that order. The petition sought review of an actual controversy between petitioner and the Immigration and Naturalization Service over the legal right of petitioner to apply for suspension of deportation under that statute. The decision of the Court below, contrary to the decision of this Court in *Foti,* supra, held that even though the Immigration and Naturalization Service had found petitioner ineligible for suspension of deportation such decision was not within the ambit of Section 106(a).

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2. THE DECISION BELOW LIMITS THE SCOPE OF JUDICIAL REVIEW UNDER THE ABBREVIATED PROCESS OF JUDICIAL REVIEW PRESCRIBED BY SECTION 106(a).

This Court on January 29, 1968 granted certiorari in *Cheng Fan Kwok v. Immigration and Naturalization Service,* ..... U.S. ....., 36 L.W. 3308. In the *Kwok* case, proceedings were commenced in the Court of Appeals to review a decision of a District Director of the Immigration and Naturalization Service denying

Kwok's application for a stay of deportation. The Court of Appeals for the Third Circuit in the *Kwok* case, 381 F2d 542, dismissed the petition for review for lack of jurisdiction. However, in reaching that conclusion the Court referred specifically to the conflicting interpretations of different Circuits as to what administrative determinations are included within the purview of Section 106(a) of the Immigration and Nationality Act. In closing that Court, at page 545, stated:

> "Finally, we can only add our concurrence to the Second Circuit's conclusion that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes."

This Court in *Giova v. Rosenberg,* 379 U.S. 18 (1964), held that an order of the Board of Immigration Appeals denying a petition to reopen was subject to review under Section 106(a) of the Act.

In the case at bar, petitioner seeks review of a final administrative decision of the Board of Immigration Appeals holding him ineligible for suspension of deportation under Section 244 of the Act.

In *Skiftos v. Immigration and Naturalization Service,* 332 F2d 203, 7 Cir., 1964, involving the question concerning validity of a visa petition; in *Malone v. Immigration and Naturalization Service,* 355 F2d 533, 7 Cir., 1966, involving the question of a stay of deportation; in *Talavera v. Pederson,* 334 F2d 52, 6 Cir., 1964, involving the question concerning waiver of foreign residence requirement under Section 212(e); in *Hitai v. Immigration and Naturalization Service,*

343 F2d 466, Cert. Denied 382 U.S. 816, 2 Cir., 1965, involving the question of eligibility for adjustment of status under Section 245 of the Act; in *Holz v. Immigration and Naturalization Service,* 347 F2d 353, 9 Cir., 1965, involving withholding of deportation under Section 243(h) of the Act; in *Waziri v. Immigration and Naturalization Service,* 9 Cir., not yet reported, decided January 18, 1968, involving rescission under Section 246 of the Act, those Courts held that the Court of Appeals had jurisdiction to review the final administrative determination under the provisions of Section 106(a) of the Act.

The question concerning the proper jurisdiction in which to seek review of an order such as that in the case at bar is of the utmost importance in the proper administration of the immigration and nationality laws of this country. If for no other reason, certiorari should be granted here.

CONCLUSIONS

If the fate of this petitioner alone were at stake, the case might be of small account. It is our entire democratic processes themselves that are involved. Section 106(a) of the Act specifically requires that a petition seeking review of a final administrative order must be filed within six months. In view of the conflict of decisions between the various Circuits, counsel can not gamble and file an action in the District Court seeking review without jeopardizing the right of his client to procedural due process since it clearly ap-

pears from the language contained in the decision of this Court in *Foti*, supra, that the Court of Appeals has jurisdiction to review final administrative orders pertaining to applications for suspension of deportation filed under Section 244 of the Act.

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
February 20, 1968.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 21,267

Yick Chin,
Petitioner,
vs.
Immigration and Naturalization Service,
Respondent.

[November 28, 1967]

On Petition to Review an Order of the Immigration and Naturalization Service

Before: Chambers, Pope and Merrill, Circuit Judges

Per Curiam:

Petitioner seeks review by this court under § 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a), of a ruling of the Board of Immigration Appeals denying him suspension of deportation and adjustment of status under § 244(a) of the Act, 8 U.S.C. § 1254(a).

Respondent has moved to dismiss the petition for lack of jurisdiction on the ground that the order

sought to be reviewed is not one of those "final orders of deportation * * * pursuant to administrative proceedings under section 242(b) of this Act," over which § 106(a) gives this court initial review.

The motion has merit.

Petitioner, a native of China, sought entry to the United States in 1952. He was denied entry but was paroled into the United States, where he has remained ever since. No proceedings to effect his deportation have been brought under § 242(b) of the Act, 8 U.S.C. § 1252(b). In 1966 he made application on his own initiative for discretionary relief under § 244(a), and it is the order denying him that relief which he now seeks to have reviewed.

The order, not having been entered in the course of § 242(b) deportation proceedings, is not ancillary to such proceedings and hence is not reviewable under § 106(a). *Yamada v. I&NS*, ... F.2d ..... (9th Cir. Oct. 17, 1967).

Accordingly the petition for review is dismissed for want of jurisdiction.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 21,267

Yick Chin,
Petitioner,
vs.
Immigration and Naturalization Service,
Respondent.

JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition to review in this Cause be, and hereby is, dismissed for want of jurisdiction.

Filed and entered: November 28, 1967.

Appendix C

United States Department of Justice
Board of Immigration Appeals

July 15, 1966

File: A-10844478—Los Angeles

In re: Chin, Yick

In Exclusion Proceedings

Motion

On Behalf of Appellant: Jackson & Hertogs, Esqs.
580 Washington Street
San Francisco, Calif.
94111

On Behalf of I&N Service: William S. Howell, Esq.
Trial Attorney
(Brief filed)

Excludable: Act of 1924—no immigration visa
E. O. 8766—No passport

Application: Motion to reopen to file application for suspension of deportation

An order entered by the Board of Immigration Appeals in this case on August 18, 1952 dismissed the applicant's appeal from a decision entered by a Board of Special Inquiry denying his application for admission as a citizen of the United States. He was thereafter paroled into the United States and has remained in that status for approximately 14 years.

The applicant now moves this Board to reopen the exclusion proceedings for the purpose of permitting an application for relief under the provisions of Section 244 of the Immigration and Nationality Act, as amended by the Act of October 3, 1965 (P.L. 89-236).

The applicant is a native and citizen of China. He entered the United States at the port of San Francisco, California on April 6, 1952.

It is alleged in the motion that the applicant now appears eligible to submit an application for relief under provisions of Section 244 of the Immigration and Nationality Act, as amended.

By its very terms Section 244(a) and succeeding paragraphs relate only to resident aliens who have been arrested in deportation proceedings. An excluded alien who has been paroled into the United States is not a resident. *Kaplan v. Tod,* 267 U.S. 229 (1925). 8 CFR 242.17 provides no procedure for suspension of deportation in the case of aliens who are under exclusion proceedings. Cf. *Matter of E-,* 3 I&N Dec. 541 B.I.A. March 18, 1949.

The motion will be denied.

Order: It is directed that the motion be and the same is hereby denied.

Acting Chairman

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1160

YICK CHIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of China, sought to enter the United States in April 1952 under a claim of derivative American citizenship (Pet. 4; Pet. App. C, iv; R. 22). In exclusion proceedings before a board of special inquiry, his claim of citizenship was rejected as unsupported by credible evidence and he was denied entry. The board's findings and order were sustained by the Board of Immigration Appeals on Au-

gust 18, 1952 (Pet. App. C, iv; R. 22-24).[1] Petitioner was thereafter paroled into the United States under bond for the purpose of enabling him to "prosecute an action under Section 503 [of the Nationality Act of 1940, 54 Stat. 1171]" (R. 4, 8). That section authorized persons claiming to be nationals of the United States whose claims had been denied by an executive department or official to seek to have their claims recognized in declaratory judgment proceedings (cf. Section 360 of the present Immigration and Nationality Act, 8 U.S.C. 1503). It does not appear whether such a proceeding was ever instituted; if a suit was filed it was evidently unsuccessful, since petitioner describes himself as a citizen of China (Pet. 4), and the present proceedings arose out of an attempt by petitioner to apply for a discretionary "suspension of deportation." For reasons not shown by the record, petitioner has remained in parole status in this country ever since (Pet. App. A, ii; Pet. App. C, iv).[2]

In 1966, petitioner requested the Board of Immigration Appeals to reopen the exclusion proceedings for the purpose of enabling him to file an application

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[1] So far as appears, no judicial review of the administrative proceedings was sought.

[2] Presumably it has not been possible or practicable to effect petitioner's removal to the country from where he came under recent international conditions. Petitioner was born in Kwangtung Province (on the Chinese mainland) and last resided there before coming to this country (R. 9). See also R. 11, where petitioner stated in his application for suspension of deportation that he was opposed to the Communist regime in China and that he feared political persecution if he returned to that country.

for "suspension of deportation" under Section 244 of the Immigration and Nationality Act (8 U.S.C. 1254) (Pet. App. C., iv-v). The motion was denied by the Board on the ground that Section 244 relates only to resident aliens who have been arrested in deportation proceedings and that petitioner was therefore ineligible for the relief sought (Pet. App. C, v).[3]

Petitioner thereafter filed in the Court of Appeals for the Ninth Circuit a petition for review of the Board's order under Section 106(a) of the Immigration and Nationality Act, as amended (75 Stat. 651, 8 U.S.C. 1105a(a)). The court of appeals, noting that the order sought to be reviewed had not been entered in the course of a proceeding under Section 242 (b) of the Act (8 U.S.C. 1252(b)) and was not ancillary to such a proceeding, held that the order was not reviewable by a court of appeals under Section 106(a). It accordingly dismissed the petition for want of jurisdiction (Pet. App. A).

DISCUSSION

The decision of the court of appeals is correct and no question meriting review by this Court is presented. Nor is there any reason to retain the instant case on the Court's docket pending decision in *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, No. 638, this Term, in which certiorari was granted on January 29, 1968.

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[3] The Board noted that excluded aliens who have been paroled into the United States are not residents in contemplation of law (Pet. App. C, v). See *Kaplan* v. *Tod*, 267 U.S. 228; cf. *Leng May Ma* v. *Barber*, 357 U.S. 185.

Section 106(a) of the Immigration and Nationality Act gives to the courts of appeals exclusive authority to review "all final orders of deportation heretofore or hereafter made against aliens within the United States *pursuant to administrative proceedings under section 242(b) of this Act* * * *" (emphasis added). Section 242(b) (8 U.S.C. 1252(b)) is the compendium of provisions under which special inquiry officers conduct quasi-judicial proceedings to determine the deportability from this country of resident aliens believed subject to expulsion. It has nothing to do with the exclusion of aliens who seek to enter. Exclusion proceedings are governed by a wholly different set of provisions, contained in Section 231-240 of the Act (8 U.S.C. 1221-1230). That Section 106(a) does not give courts of appeals reviewing authority with respect to orders of exclusion is clear not only from the terms of Section 106(a) itself, but also from Section 106(b) (8 U.S.C. 1105a(b)), which provides that an alien against whom a final order of exclusion has been entered may obtain judicial review of the order "by habeas corpus proceedings and not otherwise."

Petitioner is admittedly an alien who has been barred from entering this country in exclusion proceedings. The administrative paroling of him ashore did not affect his status as an excluded and therefore nonresident alien. *Kaplan* v. *Tod*, 267 U.S. 228; cf. *Leng May Ma* v. *Barber*, 357 U.S. 185. No order of deportation (within the sense of Section 106(a)) has been entered and no "administrative proceedings under section 242(b)"—the necessary preface to the entry of such an order—have been commenced or are contem-

plated. For this reason the question which has divided the courts of appeals concerning the scope of Section 106(a)—whether various kinds of determinations that are ancillary to or might affect the execution of final orders of deportation entered in proceedings brought under Section 242(b) are reviewable initially in courts of appeals (see *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217; *Giova* v. *Rosenberg*, 379 U.S. 18; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 381 F.2d 542 (C.A. 3), pending on writ of certiorari, No. 638, this Term)—is in no way involved in this case. The decisions cited by petitioner as in conflict with the decision below in this case (Pet. 8-9) all involved aspects or facets of that question. No court has held or suggested that Section 106(a) gives authority to the courts of appeals to review orders of the immigration authorities wholly unrelated to deportation orders and in no way arising out of or relating to proceedings under Section 242(b). Since no order or aspect of an order in petitioner's case is reviewable under Section 106(a), no question of bifurcation of judicial review (see *Foti* v. *Immigration and Naturalization Service*, *supra*, 375 U.S. at 226-227, 232) is involved here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

MARCH 1968.

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